

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. C 11-00736 WHA

Plaintiff,

v.

SIDEMAN & BANCROFT LLP,

**ORDER GRANTING PETITION
TO ENFORCE INTERNAL
REVENUE SERVICE SUMMONS**

Defendant.

INTRODUCTION

This is an action to enforce an internal revenue service summons for the law firm Sideman & Bancroft LLP to produce certain documents of its client, Mary Nolan, in its possession. The IRS seeks these documents in its criminal investigation of Mary Nolan. Sideman refused to produce the documents in response to the summons, invoking the Fifth Amendment and an attorney-client privilege. The United States brought the instant petition.

STATEMENT

The following facts are taken from the declarations of Special Agent Mark Pahnke, Mary Rae Fouts, and Attorney Jay Weill, and the supplemental declaration of Attorney Weill.

Agent Pahnke of the Internal Revenue Service is conducting an investigation into whether Mary Nolan committed any offense connected with the administration or enforcement of the internal revenue laws with respect to the years 2005–08, and specifically whether Nolan attempted to evade or defeat tax or made a false declaration under penalty of perjury. Agent Pahnke is authorized to issue IRS summonses under the internal revenue code and treasury

1 regulations. On October 27, 2010, he issued an IRS administrative summons to Sideman &
2 Bancroft LLP, directing it to produce the following documents:

3 FOR THE YEARS: 2007 – 2008

4 Documents in your custody or control relative to the financial transaction of:

5 MARY NOLAN
6 THE LAW OFFICE OF MARY NOLAN
7 MARY NOLAN TRUST

8 Including but not limited to the following:

9 Check Carbons (duplicates)
10 Check Receipts
11 File Folders of Expenses
12 Payment Receipts
13 QuickBooks Printouts
14 Client Billing Records
15 Rental Property Records
16 Tax Returns and Supporting Schedules
17 Monthly Client Billings
18 Check Ledgers
19 Copies of Bills
20 Daytime Planners
21 Credit Card Statements
22 Personal Tax Related Expenses (ie: [sic] medical & dental)

23 Included in the following containers:

24 4 banker boxes
25 3 large accordion folders

26 (Pahnke Decl. Exh. A). This summons is the subject of the instant government petition for
27 enforcement.

28 These documents were sought after the following had already occurred in Agent Pahnke's
investigation. Agent Pahnke had attempted to obtain the documents through a search warrant
executed at Nolan's residence and business on October 13, 2010. The documents were not there.
Among the items found during execution of the warrant, however, Agent Pahnke found references
to an income tax return preparer retained by Nolan named Mary Fouts. Fouts is an enrolled agent
authorized to practice before the IRS and a certified financial planner.

Fouts had been retained by Nolan to provide her with tax and financial planning services.
In September 2010 Nolan requested that Fouts prepare her income tax return for 2009 and
amended returns for 2007 and 2008. In order for Fouts to do her work, Nolan provided her the

1 documents that are the subject of the instant petition. From October 1 through 13, Fouts reviewed
2 these records and noted certain characteristics that made them distinctive, which she reviews in
3 her declaration.

4 On October 13, Nolan and Fouts spoke by phone, and Nolan told Fouts that the IRS was
5 executing a search warrant of her property. Nolan then went to Fouts's office and signed the
6 2009 tax return that Fouts had prepared. After Nolan left, Fouts realized that the search warrant
7 probably covered the records in her possession, so she called Nolan's attorney, Richard
8 Guadagni, to confirm that she was in possession of documents that were covered by the warrant
9 and to see how to get them to the IRS. Attorney Guadagni agreed that the documents in Fouts's
10 possession were covered by the warrant and came to pick up the documents later that day. From
11 there, Fouts believed that Attorney Guadagni was going to turn the documents over to the IRS.
12 He did not. Instead, he gave them to Nolan's new attorney, Jay Weill of Sideman & Bancroft.
13 Fouts states that she would not have given the documents to Attorney Guadagni if she had known
14 that he would not give them to the IRS.

15 Agent Pahnke then drafted the instant summons to Sideman, identifying the documents as
16 stated above based on a detailed description by Fouts. Agent Pahnke served the summons on
17 Sideman on October 27. Sideman, via Attorney Weill, has refused to produce the documents —
18 or a privilege log — based on claims of Fifth Amendment and attorney-client privilege.

19 Fouts states that the description in the summons stated above accurately summarizes the
20 documents she reviewed, including the types of boxes and folders the documents were in when
21 she saw them last. She also states that if she saw these records again she could identify and
22 authenticate them, based on her review of them and their distinctive characteristics and contents.

23 At the hearing on the instant petition, counsel for Nolan submitted a supplemental
24 declaration, which shows that subsequent to the recounted events, Fouts was served directly and
25 complied with a summons to produce additional documents concerning Nolan. The declaration
26 also appends a statement of account from Fouts to Nolan for Fouts's services. The statement
27 includes a description of services for each time entry, and counsel argued at the hearing that these
28

descriptions evidence that Fouts only reviewed the 2007 and 2008 documents subject to the instant summons for 45 minutes.

ANALYSIS

In *Fisher v. United States*, 425 U.S. 391 (1976), the Supreme Court set forth the guiding principles applicable to our situation. That decision held that taxpayers' Fifth Amendment privilege was not violated by enforcement of a documentary summons directed toward their attorneys, for production of accountants' documents that had been transferred to the attorneys in connection with an IRS investigation. Regarding attorney-client privilege, "pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client in order to obtain more informed legal advice." *Id.* at 402–04.

Sideman does not argue that the documents are subject to attorney-client privilege beyond the Fifth Amendment rights of its client, Nolan. Sideman solely argues that the documents were turned over by Nolan in the course of her seeking legal advice, and that Nolan would be allowed to assert her Fifth Amendment rights to prevent production of the documents if they were in her possession. Therefore, this order must analyze *whether Nolan would be allowed to assert her Fifth Amendment rights to prevent production of the documents if they were in her possession.*

The Fifth Amendment "would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications." *Id.* at 409. Whether the act of producing the documents constitutes a testimonial admission in violation of the Fifth Amendment depends "on the facts and circumstances of particular cases." *Id.* at 410; *see also Doe v. United States*, 465 U.S. 605, 613–14 (1984).

Our court of appeals has further held as follows. *First*, a court should consider whether production of the documents would be testimonial as to the documents' existence or location:

When the "existence and location" of the documents under subpoena are a "foregone conclusion" and the witness "adds little or nothing to the sum total of the Government's information by conceding that he in fact has the [documents]," then no Fifth Amendment right is touched because the "question is not of testimony but of surrender." The government "bears the burdens of production and proof on the questions of . . . possession[] and existence of the summoned

documents.” When deciding whether the government has met its burdens of production and proof, courts should look to the “quantum of information possessed by the government before it issued the relevant subpoena.” . . .

The government was not required to have actual knowledge of the existence and location of each and every responsive document; *the government was required, however, to establish the existence of the documents sought and Doe’s possession of them with “reasonable particularity”* before the existence and possession of the documents could be considered a foregone conclusion and production therefore would not be testimonial.

In re Grand Jury Subpoena, Dated April 18, 2003, 383 F.3d 905, 910 (9th Cir. 2004) (citations omitted; emphasis added).

This order finds that the government has carried its burden of showing that at the time the summons was issued it had established the existence and possession of the documents at issue here with at least reasonable particularity. From talking to Fouts, Agent Pahnke knew very specifically what documents existed and had been turned over to Sideman. The government knew what was in Sideman’s possession from Fouts, and so was able to describe in the summons the characteristics and number of boxes and folders in which the documents were being kept. Accordingly, the existence and location of the documents was a foregone conclusion, and Sideman adds little or nothing to the sum total of the government’s information by conceding that it in fact has the documents.

Second, a court should consider whether production of the documents would be testimonial as to the documents’ authenticity:

The authenticity prong of the foregone conclusion doctrine requires the government to establish *that it can independently verify that the compelled documents “are in fact what they purport to be.”* Independent verification not only requires the government to show that the documents sought to be compelled would be admissible independent of the witness’ production of them, but also inquires into *whether the government is compelling the witness to use his discretion in selecting and assembling the responsive documents*, and thereby tacitly providing identifying information that is necessary to the government’s authentication of the subpoenaed documents.

Id. at 912 (citations omitted; emphasis added).

This order finds that the government has carried its burden of showing production of the documents would not be testimonial because the act of production would not authenticate the documents. The summons specifically identified the documents that were in Fouts’s possession based on her description. This is not a case in which a respondent would have to use knowledge

1 and judgment to sift through, select, assemble, and produce the documents.* In this case the
2 documents were already in a circumscribed collection when they were in the possession of Fouts,
3 who reviewed them in the course of her work on Nolan’s income tax returns. She can therefore
4 authenticate them in any subsequent proceeding. When it issued the summons, the government
5 “had prior knowledge that the documents were in the custodian’s possession and the government
6 [can] independently confirm their existence and authenticity” through the testimony of Fouts. *Id.*
7 at 913 (citing *Fisher*, 425 U.S. at 412–13). The government would not need to rely on the
8 production by Sideman to demonstrate that the records are what they appear to be.

9 Nevertheless, Sideman repeatedly asserts that “the act of producing the documents in
10 Sideman’s custody would confirm the existence, possession and authenticity of such documents”
11 (Opp. 3). This argument is based on an erroneous factual premise that is divorced from the facts
12 of this case. Sideman states, “[p]rior to the Summons being issued here, the Government knew
13 only that Nolan had delivered a set of documents to Fouts, that Fouts no longer had the
14 documents, and that Nolan’s 2007 and 2008 federal income tax returns had already been filed and
15 had been under civil examination” (Opp. 6). Not so. The government knew much more than that.
16 It knew from Fouts, based on her review of the documents immediately prior to turning them over
17 to Nolan’s attorney, how many documents there were and what the collection consisted of.
18 Sideman goes on to characterize the summons as “broadly sweeping” (Opp. 6). Yet the summons
19 specifically identifies the documents previously possessed by Fouts, even stating that they are
20 contained in 4 banker boxes and 3 large accordion folders.

21 At the hearing on the petition, counsel for Nolan argued, based on a statement of account
22 from Fouts to Nolan for Fouts’s services, that Fouts only reviewed the 2007 and 2008 documents
23 subject to the instant summons for 45 minutes. His implication was that she cannot authenticate
24

25 * Counsel for Nolan stated in passing at the hearing that if the instant petition is
26 granted, Nolan would have to go through the records turned over by Fouts in order to
27 limit the documents produced to those “responsive” to the summons. This was the first
28 time such a wrinkle has been asserted. It was not raised in briefing, nor was it explained
at the hearing. As such, this order will maintain the factual premise on which briefing
and argument were otherwise based — that the production at issue is a production of all
of the documents turned over by Fouts.

1 them. This is an implication only. Her declaration definitively states under penalty of perjury, “I
2 am confident that if I saw Nolan’s 2007–2008 documents again, I could identify and authenticate
3 them, based on the personal knowledge I gained from reviewing and working with them and
4 based on their distinctive characteristics and contents,” described previously in her declaration.
5 This order does not accept as definitive the assertion that Fouts only reviewed the documents for
6 45 minutes based on review of the statement of account. Regardless, counsel’s possible reading
7 of the statement of account does not undermine the finding of this order that Fouts could
8 authenticate the documents based on the statements in her declaration.

9 Therefore, the existence, possession, and authenticity of the documents are a foregone
10 conclusion and production would accordingly not be testimonial. Nolan’s Fifth Amendment
11 rights would not be implicated by Sideman’s production of the documents in accordance with the
12 IRS summons.

13 Sideman argues that the decision of *In re Grand Jury Proceedings on Feb. 4, 1982*, 759
14 F.2d 1418 (9th Cir. 1985) (“*Terry*”), is “similar to the [situation] before the Court here” (Opp. 5).
15 *Terry* found that: “Many of the[] documents [at issue] belong to, and were prepared by, Terry,
16 himself. Terry’s production of them could therefore relieve the government of proving the
17 existence, possession, or authenticity of the records, and, thus could be incriminatory.” *Id.* at
18 1421. That is not the situation we have here. It is true that some of the documents at issue here
19 may have been prepared by Nolan. That is not the relevant point of *Terry*, however. The relevant
20 point is that Terry’s *production of the documents could have relieved the government of*
21 *authenticating them independently*. Again, the issue is whether the *production sought by the*
22 *summons* provides authenticity to the documents, which implicates the Fifth Amendment. But
23 here, Fouts can testify that Nolan and/or her attorneys gave the documents to Fouts for purposes
24 of preparing tax returns, which would authenticate the documents. Fouts’s declaration makes it
25 clear that if she saw these records again she could identify and authenticate them based on her
26 review of them and their distinctive characteristics and contents. “[I]t is not illegal to seek
27 accounting help in connection with one’s tax returns.” *Fisher*, 425 U.S. at 412. In other words,
28 the fact that Fouts had the documents in the first place is not incriminating. Unlike in *Terry*, the

1 *production by Sideman* would have no authenticating value to the government. The production
2 will therefore not implicate Nolan's Fifth Amendment rights. *See United States v. Bright*, 596
3 F.3d 683, 693 (9th Cir. 2010) ("The government did not need the Brights to authenticate such
4 documents, because the records could be independently authenticated by banking officials.").

5 Sideman also relies on the orders of Judge Marilyn Hall Patel in an under-seal proceeding
6 in this district, which it has access to presumably because it was a party therein. *See In re Grand*
7 *Jury Subpoena to Richard Sideman, Sideman and Bancroft LLP Dated June 14, 2001*, No. CR-
8 01-219-MISC-MHP ("2001 proceeding"). Sideman argues that these orders support the
9 proposition that while the existence and possession of the documents may be a foregone
10 conclusion, their authenticity is not, because, even if Fouts authenticated them, Nolan's initial
11 production of the documents to Fouts "would be a necessary link in the evidentiary chain," thus
12 incriminating Nolan. There are three reasons why these orders do not counsel for denial of the
13 instant petition.

14 *First*, the orders in the 2001 proceeding *did* enforce production of certain categories of
15 documents and conditioned production of others on the government's grant of use immunity to
16 the respondent. Yet as to use immunity, the Supreme Court has "decline[d] to extend the
17 jurisdiction of courts to include prospective grants of use immunity in the absence of the formal
18 request [by the government] that the statute requires." *Doe*, 465 U.S. at 616. This holding came
19 after and thus abrogated any suggestion to the contrary in *United States v. Porter*, 711 F.2d 1397
20 (7th Cir. 1983), a decision also relied on by counsel for Nolan at the hearing on the instant
21 petition.

22 *Second*, the orders in the 2001 proceeding held that production of certain records would
23 point the government to other sources of potentially incriminating evidence, and that production
24 of the records would thus be incriminating and testimonial, in violation of the Fifth Amendment.
25 It is axiomatic, however, that "[w]here the preparation of business records is voluntary, there is
26 no compulsion present, and consequently the contents of those records are not privileged by the
27 Fifth Amendment." *In re Grand Jury Subpoena*, 383 F.3d at 909 (citation omitted). It is not
28

1 contested here that the documents in Sideman's possession were created voluntarily, so the
2 contents of the documents are not protected by the Fifth Amendment.

3 *Third*, the orders in the 2001 proceeding also held that the documents could not be
4 authenticated by the accountant alone, so authenticity was not a foregone conclusion as required
5 by *Fisher* and its progeny. For reasons stated above, however, in our case Fouts could
6 authenticate the documents at issue here. The Fifth Amendment is concerned with whether the
7 *production by Sideman* is necessary to authenticate the documents. It is not. *Accord Bright*, 596
8 F.3d at 693.

9 Lastly, this order must address the fact that the summons *could* be construed to call for the
10 production of documents including ones other than those turned over by Fouts to Attorney
11 Guadagni on October 13, 2010, and thereafter given to Sideman. Again, the summons requires
12 production of the following:

13 FOR THE YEARS: 2007 – 2008

14 Documents in your custody or control relative to the financial transaction of:

15 MARY NOLAN
16 THE LAW OFFICE OF MARY NOLAN
17 MARY NOLAN TRUST

18 Including but not limited to the following:

19 Check Carbons (duplicates)
20 Check Receipts
21 File Folders of Expenses
22 Payment Receipts
23 QuickBooks Printouts
24 Client Billing Records
25 Rental Property Records
26 Tax Returns and Supporting Schedules
27 Monthly Client Billings
28 Check Ledgers
Copies of Bills
Daytime Planners
Credit Card Statements
Personal Tax Related Expenses (ie: [sic] medical & dental)

Included in the following containers:

4 banker boxes
3 large accordion folders

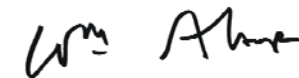
(Pahnke Decl. Exh. A). It is possible that Sideman, as counsel for Nolan, has documents that would be responsive to the summons other than those turned over by Fouts. Yet rather than limiting its production to the Fouts documents, Sideman has simply refused to produce anything in response to the summons. Moreover, Sideman has not told the Court whether it has in its possession any more than the Fouts documents that would be responsive. Yet the government clearly seeks to enforce this summons to obtain the Fouts documents. As such, and to be clear, this order grants the government's petition only insofar as the summons lists the documents sought. In other words, this order strikes the language "including but not limited to the following" from the summons, and replaces it with "specifically the following," leaving to a future day whether there is any need or occasion to compel more.

CONCLUSION

For the foregoing reasons, the government's petition to enforce the IRS summons against Sideman & Bancroft LLP — as limited by this order — is **GRANTED**. Respondent shall turn over the subject documents within **SEVEN CALENDAR DAYS** of the date of this order.

IT IS SO ORDERED.

Dated: April 8, 2011.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE